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JUN 29 1994

*ADMITTED IN VA ONLY

June 29, 1994

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

Re: Comments of the National Hockey League
MM Docket No. 92-266

Dear Mr. Caton:

Attached please find, on behalf of the National Hockey League, an original and four copies of its Comments filed in MM Docket No. 92-266.

Should you have any questions regarding this filing, please contact the undersigned counsel.

Sincerely,


Philip R. Hochberg

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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JUN 29 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition)
Act of 1992: Rate Regulation)

MM Docket No. 92-266

**Comments of
National Hockey League**

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June 29, 1994

SUMMARY

The National Hockey League opposes the Commission's proposal that the systems use all or a portion of the profit from commercial rates to offset subscriber rates.

The FCC's proposal simply is not justified under the terms of the 1992 Cable Act or under a common-sense approach. Moreover, the net effect will produce a windfall for sports bars and restaurants and a loss for sports teams, Regional Sports Networks, cable operators, and ultimately for the public, if the manner of sports distribution is changed.

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**Comments of
National Hockey League**

The National Hockey League (hereinafter sometimes "NHL" or "the League") submits these comments in response to the Commission's Fifth Notice of Proposed Rule Making (hereinafter "Notice"), Mass Media Docket No. 92-266,¹ dealing with specific rate regulation issues affected by the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter "the Act").² For the reasons set forth below, the NHL urges the Commission to reject any rate formula that would fail to distinguish between residential and commercial rates and tend to equalize the two. Instead, the FCC should confirm the propriety of separate commercial rates.

I. Introduction

The NHL has eighteen teams in the continental United States (and eight in Canada), most of which have over-the-air television contracts. Of the eighteen U.S. clubs, 17 have

¹Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 94-38, ___ FCC Rcd. ___, 59 Fed. Reg. 18064 (1994).

²Pub. Law 102-385, 102 Stat. 1460 (1992).

cable contracts and, of these, 15 are carried on a basic tier. These contracts collectively are worth in excess of \$50 million. As programmers in the television marketplace, the League and its individual clubs have a substantial interest in certain issues raised in this proceeding, including most specifically the commercial rate issue.

At issue in this proceeding is whether it is appropriate for cable operators to charge a separate and higher commercial rate to establishment such as bars and restaurants. The Commission apparently thinks not:

[W]e solicit comment on whether we should establish regulations governing rates for regulated cable service provided to commercial establishments. In particular, we ask whether higher earnings for commercial establishments should be offset by lower rates to other subscribers. We solicit comment on whether the offset in rates to other subscribers should be exactly equal to the additional earnings from higher commercial rates. Alternatively, we could establish regulations that would mandate a specified level of sharing of earnings from higher commercial rates between operators and subscribers. We solicit comment on which approach would best serve subscribers and operators. We also solicit comment on what standards of reasonableness we could establish to govern commercial rates.³

The NHL strongly opposes the concepts outlined in the Notice and believes that no action of this type should be taken.

³Supra note 1, at Para. 257. This also appears at 59 Fed. Reg. 18065.

II. Neither the Cable Act Nor Commission Precedent Justifies
Conferring Special Financial Benefits on Commercial
Establishments

A significant -- indeed, perhaps principal -- purpose of the Cable Act was to benefit residential subscribers and protect them against unreasonable and unwarranted rate increases. What the Commission mistakenly refers to as "certain isolated references in the legislative history to 'homes' and 'households'"⁴ should in fact be a common-sense recognition that the Act was not intended to provide a financial windfall to the sports bar industry.⁵

There is no indication that Congress intended to have the Commission adopt such a strained interpretation to reduce residential rates. Indeed, if anything, the Commission should be confirming just the opposite: that commercial, profit-making establishments may be charged different rates.⁶

The fact that Congress specifically used the term "household" in Section 623(1)(1) cannot be ignored. The focus of the Act is on residential subscribers. It was ordinary consumers, not commercial, profit-making businesses that

⁴Supra note 1, at Para. 184.

⁵Commercial establishments have long been distinguished from the residential user of programming. See, for example, Section 119 of the Satellite Home Viewer Act of 1988. There, in a section dealing with service comparable to cable service, Congress limited the scope of the satellite compulsory license to "private home viewing." See also, 17 U.S.C. Sections 106(4) and 111(b); 18 U.S.C. Section 2511(4)(c); and 47 U.S.C. Section 705(a).

⁶See infra note 8.

Congress sought to protect by authorizing the FCC to regulate cable rates. The Act and the legislative history use common-sense and well recognized terms like "households"⁷ and "homes,"⁸ and the FCC should not contort those words to mean something else.

Indeed, the Commission, in the context of this very proceeding, has consistently referred to "homes," "dwellings," and "households," hardly profit-making commercial establishments. For example, in the Report and Order in Docket No. 92-266, the Commission discussed uniform rate structures in terms of apartment buildings, hotels, condo associations, hospitals, universities, and trailer parks -- all residences of one form or another.⁹

Even the FCC's long-standing definition of a cable subscriber shows an inherent limitation in who is covered. Section 76.5(ee) of the Commission's Rules defines a subscriber as

⁷See, e.g., Cable Television Consumer Protection and Competition Act of 1992, United States House of Representatives, Rep. No. 102-628, 102nd Cong., 2d Sess. at 78,89 (1992).

⁸See, e.g., Remarks of Senator Heflin, 138 Cong. Rec. 5757 (Jan. 31, 1992).

⁹The Commission noted with approval bulk rate discounts to these dwelling units. Rate Regulation Report and Order, 8 FCC Rcd. 5631, 5897 (1993).

A member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it.¹⁰

That a sports bar or restaurant "further distributes" the programs received is beyond question. It is comparable to the copyright concept of "performance" and the payment that is made for the performance of various works.

III. The Commission's Proposal Will Result in an Unwarranted and Unintended Windfall to Sports Bars and Is Contrary to the Interests of Sports Teams, Cable Operators and the Public

In its Notice, the Commission took special note of providing service to commercial subscribers, "such as sports bars and restaurants."¹¹ The sports bar industry has grown tremendously in the past decade, fueled significantly by sports on cable.¹² This growth has been accompanied by substantial unlawful pirating of signals in violation of federal copyright law.¹³ In 1990, there were at least 100,000 sports bars in the United States.¹⁴ Moreover, sports bars are

¹⁰Emphasis added.

¹¹Supra note 1, at Para. 184.

¹²The critical factor in the growth of sports bars has been "specifically the . . . availability of sports on cable television." "Why Are There Sports Bars," Sports, inc., Dec. 12, 1988, at 19.

¹³NFL v. McBee & Bruno's, 792 F.2d 726 (8th Cir. 1986).

¹⁴Wall Street Journal, Nov. 10, 1990, at B1. The Los Angeles Times estimated at about the same time that some 200,000 bars and restaurants were equipped with satellite dishes used to receive sports programming. Los Angeles Times, Aug. 29, 1990, at C4.

not necessarily "Mom-and-Pop" operations. For example:

- Game Keepers, Chicago, IL - 21 television monitors and one eight foot projection screen;
- Park Avenue Country Club, New York, NY - 34 television sets in a 9,000 square foot layout;
- Champion's, Baileys Cross Roads, VA - "a remodeled airport hanger with an indoor soccer ring [hosting] more than 600 people."¹⁵

And, as a result of a new plan by the National Football League, sports bars will now be able to legally carry a package of NFL games throughout the season, viewed as a significant boon to the sports bar industry.¹⁶

Sports bars have become so widespread because ordinary taverns have found that they can significantly increase their patronage and their food and drinks sales by offering a range of sports events on television. In effect, they show sports events to large audiences just as theaters do with feature films. No one would suggest that movie studios are obligated to show films to large audiences of theater-goers for the same rate that those films are available to individual households. But that is precisely what the Commission proposes to do there.

As is clear from the Notice, the Commission has in fact proposed that special commercial rates would be approved only

¹⁵See Chicago Tribune, January 1, 1993, at F-4 and March 9, 1993, at T-1 and Washington Post, July 12, 1993, at D1.

¹⁶USA Today, May 17, 1994, at 10C.

on a case-by-case basis and has stated that it would not authorize "special, presumably higher, rates"¹⁷ for regulated services to commercial subscribers, "such as sports bars and restaurants." Contrary to the Commission's apparent view, such rates are well established and economically justified.

In effect, the Commission is proposing far more than a simple limit on the amounts that are charged to sports bars and restaurants by cable operators. The Notice suggests that the Commission is in fact considering a "zero-sum" game where every dollar in extra income from profit-making commercial establishments would be offset by reducing charges to residential subscribers. If the Commission's proposal takes effect, profit-making and commercial establishments will gain a subsidy and an unintended financial windfall, at the expense of cable operators, Regional Sports Networks ("RSNs"), and ultimately NHL teams. This windfall was entirely unintended by Congress and should not be conferred through a "back-door" approach.

- (a) The Commission's proposal will deprive NHL teams of substantial income.

NHL teams collectively sell to Regional Sports Networks packages of television rights consisting of both home and away games worth in excess of fifty million dollars. The RSN in turn contracts with various cable operators in the team's

¹⁷Supra note 1, at Para. 184.

marketing territory to show the games, usually as part of a basic tier.¹⁸ NHL teams, therefore, have a vital financial interest in the outcome of this proceeding.

In contracting with the local cable operator, the RSN requires one payment for the system's delivery to residential subscribers and an additional payment from the cable operator for service to commercial establishments.¹⁹ As a vast general rule, these commercial restaurants and bars are interested in cable service for one reason alone, the sports programming. The rights fee earned by NHL teams is of course directly related to the sizable share of revenue that comes from the commercial rate.

The potential loss of these revenues is matter of substantial concern to NHL teams. Because of hockey's present inability to obtain significant national broadcast and television revenues,²⁰ NHL teams are dependent on local television revenues to a greater degree than are teams in other professional sports. If local television revenues were significantly reduced, as the Commission's proposal threatens to do, a number of NHL teams -- especially those in smaller

¹⁸As stated supra at page 2, nearly every RSN package calls for some basic tier carriage.

¹⁹On occasion, the RSN will itself perform the marketing and sales function to the commercial establishment.

²⁰See Interim Report, Inquiry into Sports Migration, PP Docket No. 93-21, ___ FCC Rcd. ___ at Para. 53 (1993).

markets -- would face financial losses or risk becoming non-competitive or both.

Sports teams have a traditional and legitimate concern that showing home games on television may reduce revenues from ticket sales. The teams' concern with potentially thousands of customers gathering in venues of significant size which replicate the arena situation cannot be underestimated. The financial impact of this is alleviated by the premium paid to the team by the RSN for the rights to license these bars and restaurants.

From the standpoint of the Regional Sports Network, the sale to commercial establishments goes to the bottom line; one RSN estimated that some 23% of its gross revenues came from restaurants and sports bars. Commercial establishments provide \$1.8 million of the RSN's \$7.8 million net. The hundreds of bars and restaurants served allow the residential price to be kept low. Other RSNs estimated between 9 and 15% of the net came from commercial establishments.²¹

For NHL teams, literally millions of dollars are at risk. If those dollars are lost, teams may seek to offset their losses by increasing attendance revenues through a reduction in the number of televised home games, a rise in ticket prices or both.

²¹Information on file with League.

- (b) The result of the Commission's actions may be to reduce the number of games on basic cable and increase the number of games shown otherwise.

While the Commission admittedly has not directly limited what may be charged of sports bars or restaurants, it has done so by indirection. Suggesting that there should be an offset "exactly equal to the additional earnings from higher commercial rates"²² is a virtual command to cable operators simply to reduce their commercial rates to the residential level. Why continue to charge the higher rate only to create the bookkeeping morass of adjusting the lower rate? Why go through the mechanics of the zero-sum game?

An action of this type, while perhaps intended to benefit consumers, may have exactly the opposite effect. RSNs and sports teams cannot and should not be expected passively to accept the loss of revenue the Commission's proposal entails. As suggested in the previous section, the FCC's proposal may lead to a reduction in the number of televised games or an increase in ticket prices. Another risk is that it will force games off of the basic tier and onto a non-rate regulated tier.

From the standpoint of the Regional Sports Networks, adoption by the Commission of its proposal would create economic chaos. RSNs would find that the monetary value of serving commercial establishments would disappear and, with

²²Supra note 1, at Para. 257.

it, the margins that often are the difference between profit and loss. As stated supra, one RSN has estimated that in excess of 20% of its net comes as a result of its sports bar service.²³ In order to stay in business, the RSNs may urge teams to shift from a basic service to a non-regulated tier or an a la carte basis or delivery by satellite.

The NHL teams have no desire to do this. But it will be a realistic option if the Commission, through a short-sighted interpretation, displaces a huge share of the cable market.

IV. Conclusion

The Commission's zeal to look for any and all ways to lower residential rates just does not make sense in this context. No party sought it; no party would have been brazen enough to suggest it; and it cannot withstand a dispassionate economic analysis.

The Commission ought to recognize its efforts in the commercial rate area simply are misguided.

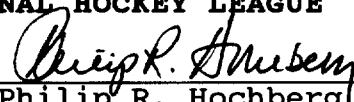
²³Supra note 20.

For the reasons stated herein, the National Hockey League respectfully requests a recognition of separate commercial rate treatment.

Respectfully submitted,

NATIONAL HOCKEY LEAGUE

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